

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ELLIOTT BAMFORTH,

Plaintiff,

V.

CAROLYN W. COLVIN, Acting  
Commissioner of the Social Security  
Administration,

Defendant.

CASE NO. 13-cv-05618 BHS

## REPORT AND RECOMMENDATION ON PLAINTIFF'S COMPLAINT

Noting Date: June 13, 2014

This matter has been referred to United States Magistrate Judge J. Richard  
Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR  
4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261,  
271-72 (1976). This matter has been fully briefed (see ECF Nos. 16, 17, 18).

After considering and reviewing the record, the Court finds that the ALJ failed to properly incorporate all opined limitations from examining doctor Diana Frey, Ph.D. into the Residual Functional Capacity (“RFC”) finding and failed to provide specific and legitimate reasons to discredit the limitations. Because this was not harmless error, this matter should be reversed and remanded for further proceedings.

## **BACKGROUND**

Plaintiff, ELLIOTT BAMFORTH, was born in 1979 and was 29 years old on the alleged date of disability onset of December 31, 2008 (*see* Tr. 148, 154). Plaintiff did not graduate, nor does he have his GED (Tr. 37-38). Plaintiff states he last worked in 2003 when he worked for five years loading and unloading produce from trucks (Tr. 37-39).

The ALJ found that plaintiff has at least the severe impairments of “Methamphetamine and cannabis abuse induced anxiety disorder with alleged panic attacks along with psychotic disorder not otherwise specified (“NOS”) and mood disorder NOS. The medical evidence of record reflects no significant physical medical impairment (20 CFR 404.1520(c) and 416.920(c))” (Tr. 24). At the time of the hearing, plaintiff was homeless (Tr. 37, 41).

## PROCEDURAL HISTORY

On May 26, 2010, plaintiff protectively filed an application for disability insurance (“DIB”) benefits pursuant to 42 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits pursuant to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act (*see* Tr. 73-74, 148-53, 154-57). The applications were denied initially and following reconsideration (Tr. 77-92, 94-105). Plaintiff’s requested hearing was held before Administrative Law Judge Paul Robeck (“the ALJ”) on March 30, 2012 (*see* Tr. 33-68). On April 27, 2012, the ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security Act (*see* Tr. 18-32).

1 On May 21, 2013, the Appeals Council denied plaintiff's request for review,  
 2 making the written decision by the ALJ the final agency decision subject to judicial  
 3 review (Tr. 1-6). *See* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court  
 4 seeking judicial review of the ALJ's written decision in July, 2013 (*see* ECF No. 1).  
 5 Defendant filed the sealed administrative record regarding this matter ("Tr.") on October  
 6 3, 2013 (*see* ECF Nos. 10, 11).

7 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether the  
 8 ALJ erred in failing to include any limitations on plaintiff's mental abilities while finding  
 9 a moderate limitation in concentration, persistence, and pace; and (2) Whether the ALJ  
 10 erred in failing to include limitations recommended by the consultative examiner or  
 11 giving reasons for excluding them (*see* ECF No. 16, p. 2).

13 STANDARD OF REVIEW

14 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's  
 15 denial of social security benefits if the ALJ's findings are based on legal error or not  
 16 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d  
 17 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.  
 18 1999)).

19 DISCUSSION

20 **(1) Did the ALJ err in failing to include any limitations on plaintiff's mental  
 21 abilities while finding a moderate limitation in concentration, persistence,  
 22 and pace?**

23 At step three of the sequential evaluation the ALJ found plaintiff to have mild  
 24 restrictions in activities of daily living, and moderate difficulties in maintaining social

1 functioning and in maintaining concentration, persistence, and pace (Tr. 26). Because  
2 plaintiff was not found to meet or equal a listing at step three, the ALJ determined  
3 plaintiff's RFC and found him capable of performing "a full range of work at all  
4 exertional levels but with the following nonexertional limitations: He is limited to no  
5 more than occasional contact with co-workers, supervisors and the general public." *Id.*  
6 Plaintiff argues the ALJ erred by failing to incorporate any limitations into the RFC to  
7 account for plaintiff's moderate limitation in maintaining concentration, persistence and  
8 pace (ECF No. 16, p. 5-6). Defendant concedes, and this Court agrees, that the ALJ  
9 should have made a specific finding in the RFC assessment related to plaintiff's moderate  
10 limitation in concentration, persistence, and pace (ECF No. 17, p. 5) However, in this  
11 case, defendant argues, the error was harmless.  
12

13 The Ninth Circuit has "recognized that harmless error principles apply in the  
14 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)  
15 (*citing Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th  
16 Cir. 2006) (collecting cases)). The Ninth Circuit noted that "in each case we look at the  
17 record as a whole to determine [if] the error alters the outcome of the case." *Id.* The court  
18 also noted that the Ninth Circuit has "adhered to the general principle that an ALJ's error  
19 is harmless where it is 'inconsequential to the ultimate nondisability determination.'" *Id.*  
20 (*quoting Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008))  
21 (other citations omitted). The court noted the necessity to follow the rule that courts must  
22 review cases "'without regard to errors' that do not affect the parties' 'substantial  
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1 rights.”” *Id.* at 1118 (quoting *Shinsheki v. Sanders*, 556 U.S. 396, 407 (2009) (quoting 28  
 2 U.S.C. § 2111) (codification of the harmless error rule)).

3 At the hearing, the ALJ posed only one hypothetical question to the vocational  
 4 expert (“VE”). The hypothetical mirrored the ALJ’s RFC finding, but with the additional  
 5 limitation to only “simple, repetitive tasks.” (Tr. 26, 60). The VE testified someone with  
 6 those limitations would be capable of performing both of plaintiff’s past jobs. *Id.* Based  
 7 on the record as a whole, and the fact that the ALJ only posed one hypothetical to the VE,  
 8 it is reasonable to assume the ALJ intended plaintiff’s RFC finding to include the  
 9 limitation to simple, repetitive tasks. The failure to include this limitation appears to be a  
 10 scrivener’s error.  
 11

12 Further, neither plaintiff nor defendant contest that the limitation to simple,  
 13 repetitive tasks would adequately account for a moderate limitation in concentration,  
 14 persistence and pace. The VE testimony shows that had the limitation to simple,  
 15 repetitive tasks been included in the RFC finding, the ALJ’s step four finding and  
 16 ultimate disability determination would not change (See Tr. 60). Therefore, the ALJ’s  
 17 error in failing to include this limitation in the RFC finding was harmless. *See Molina*,  
 18 674 F.3d at 1115.  
 19

20 **(2) Did the ALJ err in failing to include limitations recommended by the  
 21 consultative examiner or giving reasons for excluding them?**

22 Diana Frey, Ph.D., examined plaintiff on October 3, 2010 as part of a  
 23 psychological consultative evaluation (Tr. 353-60). She diagnosed plaintiff with  
 24 psychotic disorder NOS, mood disorder NOS, methamphetamine/cannabis induced

1 anxiety disorder with panic attacks, rule out Schizoaffective Disorder, and rule out  
 2 paranoid personality disorder (Tr. 359). She measured his GAF score at 40 and offered  
 3 the following functional assessment:

4 The claimant can reasonably be expected to understand and carry out specific  
 5 instructions and to sustain a steady pace of work to complete a task and reach a  
 6 desired outcome, as long as the task is not too complex. However, he would likely  
 7 need explicit instructions and adequate supervision to ensure that he is clear about  
 8 work expectations and so that there is an opportunity to monitor his thinking  
 9 process. Because of his distrust of others, he would likely do better in positions  
 10 where there are easily defined, objective criteria by which to judge his work  
 11 performance. Also, the claimant would likely respond more positively to an  
 12 environment where he is allowed to keep to himself and focus on his work rather  
 13 than having to constantly interact with supervisors, peers, and the general public,  
 14 as he would probably be challenged in his ability to appropriately listen and  
 15 respond. The claimant will likely do better with structure and predictability,  
 16 which will likely decrease the chance that he will become agitated or otherwise  
 17 dysregulated in a work-like setting.

18 (Tr. 359). In evaluating this opinion, the ALJ noted:

19 In sum, the above residual functional capacity assessment is supported by the  
 20 consultative psychological evaluation by Dr. Frye, which the undersigned gives  
 21 great weight. As noted above, Dr. Frye opined that the claimant can not do  
 22 complex or detailed tasks (but can understand and carry out specific instructions  
 23 probably low semi-skilled and simple), as well as have no more than occasional  
 24 contact with the public, coworkers and supervisors (Ex. 3F). The functional  
 25 limitations listed by Dr. Frye are fully incorporated into the residual functional  
 26 capacity (RFC) set forth above.

27 (Tr. 27-28). Plaintiff argues that, despite according great weight to this opinion, the ALJ  
 28 failed to properly incorporate all of Dr. Frey's opined limitations into the RFC finding.

29 (ECF No. 16, p. 7-8). This Court agrees.

30 The ALJ must provide "clear and convincing" reasons for rejecting the  
 31 uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81  
 32 F.3d 821, 830 (9th Cir. 1996). Even when a treating or examining physician's opinion is  
 33

1 contradicted, that opinion “can only be rejected for specific and legitimate reasons that  
 2 are supported by substantial evidence in the record.” *Id.* at 830-31. In this case, while the  
 3 ALJ stated that he gave great weight to the Dr. Frey’s entire opinion, he did not  
 4 incorporate all of Dr. Frey’s opined limitations into the RFC finding. The ALJ was  
 5 required to provide at least specific and legitimate reasons for discounting the parts of the  
 6 opinion not incorporated into the RFC finding, and committed reversible error in failing  
 7 to do so.

8 Defendant argues that the ALJ properly accounted for all of Dr. Frey’s limitations  
 9 in the RFC finding by limiting plaintiff to simple, repetitive tasks. (ECF No. 17, p. 9-10).  
 10 While an ALJ’s RFC finding need not be identical to credible medical opinions, it does  
 11 need to be consistent with them. *See Chapo v. Astrue*, 682 F.3d 1285, 1288 (10<sup>th</sup> cir.  
 12 2012) (“[T]here is no requirement in the regulations for a direct correspondence between  
 13 an RFC finding and a specific medical opinion on the functional capacity in question.”);  
 14 *Turner v. Comm’r of Social Sec.*, 613 F.3d 1217, 1223 (9<sup>th</sup> Cir. 2010) (accepting  
 15 limitations that were “entirely consistent” with physician’s evaluation). Here, even if the  
 16 Court assumes the RFC finding was meant to include a limitation to simple, repetitive  
 17 tasks, this limitation alone is not consistent with all opined limitations from Dr. Frey.

18 Most notably, Dr. Frey opined plaintiff would have many limitations regarding the  
 19 type of supervision he would require. Dr. Frey opined plaintiff would need “explicit  
 20 instructions and adequate supervision to ensure that he is clear about work expectations  
 21 and so that there is an opportunity to monitor his thinking process.” (Tr. 359). She also  
 22 opined he would “likely do better in positions where there are easily defined, objective

1 criteria by which to judge his work performance.” *Id.* Dr. Frey’s opinion seems to imply  
 2 plaintiff would need more than the typical level of supervision to ensure he completes  
 3 tasks, and defendant provides no support for a conclusion that all “simple, repetitive  
 4 work” would provide this specialized level of supervision.

5 Further, while the ALJ does address plaintiff’s social functioning by limiting him  
 6 to occasional contact with the public, coworkers, and the general public, this also fails to  
 7 adequately incorporate the limitations related to supervision (Tr. 26). Dr. Frey’s opined  
 8 limitations related to the quality of the supervision needed, not the quantity. The  
 9 limitations opined by Dr. Frey may have a vocational impact, which could affect the  
 10 ultimate disability determination. Therefore, the ALJ’s failure to include these  
 11 limitations into the RFC finding, or provide specific and legitimate reasons to discredit  
 12 them, was harmful error. *See Molina*, 674 F.3d at 1115.

14 CONCLUSION

15 The ALJ gave great weight to the opinion of Dr. Frey, but failed to properly  
 16 incorporate all of Dr. Frey’s opined limitation into the RFC finding. Further, he failed to  
 17 provide specific and legitimate reasons to discredit those limitations.

18 Based on these reasons, and the relevant record, the undersigned recommends that  
 19 this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §  
 20 405(g) to the Acting Commissioner for further consideration. **JUDGMENT** should be  
 21 for **PLAINTIFF** and the case should be closed.

22 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
 23 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.  
 24

1 Civ. P. 6. Failure to file objections will result in a waiver of those objections for  
2 purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C).  
3 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the  
4 matter for consideration on June 13, 2014, as noted in the caption.

5 Dated this 21<sup>st</sup> day of May, 2014.

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10 J. Richard Creatura  
11 United States Magistrate Judge  
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